

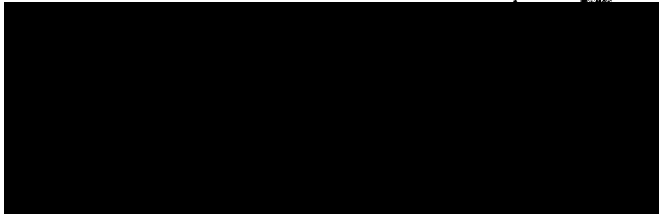
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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship
and Immigration
Services



FILE:

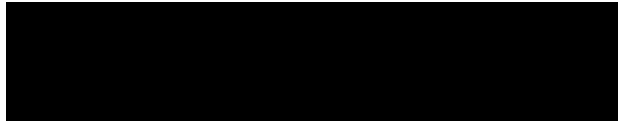
Office: CALIFORNIA SERVICE CENTER

Date: JUL 12 2004

IN RE:

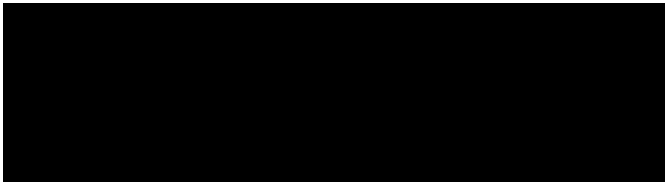
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is an animal hospital. It seeks to employ the beneficiary as an Associate Veterinarian pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as member of the professions holding an advanced degree. As required by statute, the petition was accompanied by certification from the Department of Labor. The director found that the beneficiary was "ineligible for classification as a member of the professions holding an advanced degree."

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) states:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states:

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

A petitioner must demonstrate its ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 4, 2000. The beneficiary's annual salary as stated on the labor certification is \$75,200 per annum.

The petition was accompanied by evidence of an educational degree from [REDACTED] indicating that the beneficiary earned a doctorate in Veterinary Medicine in May 1999. Also submitted were a copy of the beneficiary's State of Nevada veterinary license and an incomplete copy of the petitioner's tax return for 2001.

On August 19, 2002, the director issued a notice requesting evidence of the petitioner's ability to pay the proffered wage in the form of federal tax returns, copies of annual reports, or audited financial statements dated from April 4, 2000 to the present.

In response, the petitioner submitted copies of IRS Form 1065, U.S. Return of Partnership Income, for the tax years ending 2000 and 2001 for two business entities, [REDACTED]

[REDACTED] A letter accompanying the petitioner's response from counsel stated: "Please be informed that both animal clinics are owned by [REDACTED] with the family trust [REDACTED]. Both clinics are consolidated at the address shown on the tax returns and employees are mutually interchanged between them, as needed." The tax returns for [REDACTED] are irrelevant to the present case, however, as they reflect a different employer identification number from that of the petitioning entity [REDACTED]

In determining the petitioner's ability to pay, CIS (Citizenship and Immigration Services) will examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As the petitioner's priority date falls on April 4, 2000, CIS must examine the petitioner's tax returns beginning in 2000. The petitioner's IRS Form 1065 for calendar years 2000 and 2001 presents an ordinary income from business activity of \$177,150 and \$342,917, respectively. We find that the petitioner is able to pay a proffered wage of \$75,200 per year out of this income.

On November 7, 2002, the director issued a second notice requesting "all schedules and tables" that accompanied the previously submitted tax returns for 2000 and 2001 and "an official academic record showing that the [beneficiary] has a United States advanced degree or foreign equivalent degree." The petitioner responded by submitting requested schedules and tables related to the tax returns.

On March 10, 2003, the director denied the petition, stating: "The beneficiary appears to have a United States advanced degree.... There is no provision allowing a copy of the degree, alone, as sufficient evidence to substantiate an advanced degree. Therefore, the petitioner has not shown that the beneficiary has an academic record showing an advanced degree."

The director's decision is contradictory in that it first states that the beneficiary appears to have a United States advanced degree, but then it later concludes that such a degree has not been demonstrated. The AAO has independently verified the existence of the beneficiary's U.S. Doctorate of Veterinary Medicine with the Tuskegee University Registrar's Office. The beneficiary thus qualifies as a member of the professions holding an advanced degree.

The director's decision also stated: "[CIS] was informed that there are two animal clinics which have the same owner, and that both clinics are consolidated at the address shown on the tax returns.... Evidence to substantiate that the two clinics are consolidated at the same address [was] not provided." While the relevance of this issue has not been fully explained by the director, it is noted that the evidence presented on appeal adequately demonstrates that both clinics are headquartered at 2385 East Tropicana Avenue, Las Vegas, Nevada.

For the above stated reasons, we find that the evidence presented by the petitioner is adequate to overcome the deficiencies noted in the director's decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.